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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. [illegible]

BETTIE WILSON, PLAINTIFF IN ERROR,

vs.

REPUBLIC IRON AND STEEL COMPANY AND WARNER [illegible]

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA

(27,319)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 564.

BETER WILSON, PLAINTIFF IN ERROR,

vs.

REPUBLIC IRON AND STEEL COMPANY AND WARNER STINSON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

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1 TRANSCRIPT FROM THE CIRCUIT COURT OF JEFFERSON COUNTY.

Summons and Complaint.

Filed April 29, 1918. Chas. J. Allison, Clerk.

THE STATE OF ALABAMA,
Jefferson County:

Circuit Court.

To Any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summons Republic Iron & Steel Company, a body corporate, and Warner Stinson, to appear before the Circuit Court, to be held for said County, at the place of holding the same, within thirty days from service of this process, then and there to answer the complaint of Beter Wilson.

Witness my hand this the 25th day of March, 1918.
WM. J. WALDROP,
Clerk.

Complaint.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON & STEEL COMPANY, a Body Corporate, and WARNER STINSON, Defendants.

Plaintiff claims of the defendants Thirty Thousand Dollars ($30,000.00), damages, for that, on, to-wit, July 2, 1917, plaintiff, while in the employment of the defendant Republic Iron & Steel Company, and while engaged in the active performance of the duties of said emloyment, was injured in the County of Jefferson, State of Alabama, as follows: a piece of rock entered plaintiff's eye, severely and seriously injuring said eye, thereby causing plaintiff to endure very great physical and mental pain and suffering, to lose a great deal of time from his employment, and to incur great expense in and about the treatment of said eye, permanently injuring plaintiff and permanently rendering him less able to earn a livelihood. Plaintiff avers said injuries were proximately caused by the negligence of the defendant, Warner Stinson, a person in the service or employment of the defendant Republic Iron and Steel Company, to whose orders or directions plaintiff, at the time of the infliction of the injury complained of, was bound to conform, and did conform, and said injuries resulted from his having so conformed, which negli-

gence consisted in this, said Warner Stinson negligently ordered plaintiff to drill rock in dangerous proximity to Ed. Griffin who, at said time, was breaking rock.

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W. A. DENSON,
Attorney for Plaintiff.

Plaintiff demands a jury for the trial of the above cause.

W. A. DENSON,
Attorney for the Plaintiff.

Filed in office 25th day of March, 1918.

WM. J. WALDROP,
Clerk.

Sheriff's Returns.

Executed this the 27th, day of March, 1918 on Republic Iron & Steel Company, a body corporation, by leaving a copy of the within with Borden Burr, Agent of said Company.

THOS. J. BATSON,
Sheriff,
By T. P. PATTERSON, *D. S.*

Executed this the 1st, day of April, 1918 by leaving a copy of the within with Warner Stinson.

THOS. J. BATSON,
Sheriff,
By T. J. BATSON, *D. S.*

Order of Removal.

In the Circuit Court of Jefferson County, Alabama.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON AND STEEL COMPANY, a Corporation, and WARNER STINSON, Defendants.

To the Honorable Judges of the Circuit Court of Jefferson County, Ala.:

Your petitioner, Republic Iron & Steel Company, which is a corporation organized and existing under the laws of the State of New Jersey, and having its principal place of business in Youngstown, Ohio, represents unto this Honorable Court:

That the matter and amount in dispute in the above entitled suit exceeds, exclusive of costs and interest, the sum or value of $3,000.00; that the controversy in said suit is between citizens of different states, and that the petitioner, Republic Iron & Steel Company, was, at the commencement of this suit and still is, a citizen of the State

of New Jersey, and that the defendant, Warner Stinson, was
3 at the commencement of this suit, and still is a citizen of the State of Alabama; that the plaintiff, Beter Wilson, was, at the commencement of this suit, and still is a citizen of the State of Alabama.

Petitioner further states that it was served in said suit on March 27th, 1918.

Your petitioner further says that in this suit plaintiff has fraudulently, wilfully, improperly and illegally joined as co-defendant, one Warner Stinson; and your petitioner says that Warner Stinson was fraudulently, wrongfully, improperly and illegally joined as co-defendant in this suit because of the fact that the said Warner Stinson is a citizen and resident of the State of Alabama, for the sole purpose of defeating the jurisdiction of the United States Court. Your petitioner says that it denies that it is the intent or purpose of the plaintiff to prosecute the action in good faith against the said Warner Stinson, but that the said Warner Stinson was made a party defendant for the sole purpose and reason of attempting to defeat the removal of this cause to the District Court of the United States, and to defeat the jurisdiction of said District Court of the United States; and your petitioner further says that the said Warner Stinson did not in any manner or degree contribute to the injury of the said plaintiff through his own negligence, or through any joint negligence with this petitioner.

Your petitioner further says that it is the only defendant in this action, and that said plaintiff at the time of the filing of his suit well knew that the said Warner Stinson was not guilty with the petitioner of any joint negligence, and that the said Warner Stinson is a sham defendant, and is so made a defendant for the sole and only purpose of fraudulently, improperly and illegally defeating the removal of this case to the United States Court and defeating the jurisdiction of the United States Court in this cause, as aforesaid.

Your petitioner further says that at the time and place where plaintiff received the injuries on account of which his suit is brought, the nominal defendant, Warner Stinson, did no act and committed no positive deed and could not, under any possible set of imaginary circumstances, have been responsible in any way to the plaintiff personally or jointly with your petitioner on account of plaintiff's injuries, and this the plaintiff at the time of bringing his said suit well knew and understood.

4 Petitioner further shows that plaintiff brings his suit jointly against this petitioner and Warner Stinson, and states that he was injured while in the employment of the petitioner, and while engaged in the active performance of the duties of his employment, and avers that "said injuries were proximately caused by the negligence of the defendant, Warner Stinson, a person in the service or employment of the defendant, Republic Iron & Steel Company, to whose orders or directions plaintiff, at the time of the infliction of the injuries complained of, was bound to conform and did conform, and said injuries resulted from his having so conformed, which negligence consisted in this; said Warner Stinson

negligently ordered plaintiff to drill rock in dangerous proximity to Ed. Griffin, who at said time was breaking rock". And this petitioner says that plaintiff at the time of the filing of his suit well knew and understood that the said Warner Stinson was not present and did not contribute positively to the infliction of any injury on the plaintiff, and committed no positive act causing plaintiff to receive his said injuries and that plaintiff well, and intimately and personally knew each and every person and individual who could by any possible chance have caused his injuries; and that possessing this knowledge he then well knew, and yet knows, that the said Warner Stinson was not and could not be in any degree whatsoever responsible to him personally for or on account of his injuries, but that he has fraudulently, improperly and illegally joined the said Warner Stinson with this petitioner as a sham defendant for the sole and only purpose of fraudulently, improperly and illegally defeating the removal of this case to the District Court of the United States, and defeating the jurisdiction of the said District Court.

Your petitioner further avers that the cause of action existing between plaintiff and this petitioner is separable and can be properly tried and adjudicated without the presence of any other party defendant; and petitioner further avers that plaintiff well knew this at the time of filing his complaint in this cause.

Your petitioner further says that in this suit plaintiff has fraudulently, wrongfully, improperly and illegally joined as co-defendant one, Warner Stinson; and your petitioner says that Warner
5 Stinson was fraudulently, wrongfully, improperly and illegally joined as co-defendant in this suit because of the fact that the said Warner Stinson is a citizen and resident of the State of Alabama, for the sole purpose of defeating the jurisdiction of the United States Court. Your petitioner says that it denies that it is the purpose or intent of the plaintiff to prosecute the said Warner Stinson in good faith, but that the said Warner Stinson was made a party defendant for the sole purpose and reason of attempting to defeat the removal of this case to the District Court of the United States, and to defeat the jurisdiction of the said District Court of the United States. And your petitioner says that plaintiff originally brought this suit in the District Court of the United States against this petitioner alone, and that the same was tried almost to a conclusion in that said Court, and that after plaintiff discovered, or was advised, that said plaintiff would not probably recover in the District Court of the United States because of the insufficiency of his cause of action he deliberately took a non-suit in said District Court of the United States and proceeded to file suit in the Circuit Court of Jefferson County, and that he had fraudulently, improperly and illegally joined as co-defendant the said Warner Stinson for no other purpose than to defeat the jurisdiction of the United States Court, and to prevent the removal of this cause of action into that said Court. And your petitioner further says that plaintiff well knew at the time of the filing of this suit, and yet well knows, that the said Warner Stinson was not, under the allegations of the complaint exhibited — could not in any degree be responsible personally to the

plaintiff, and that no joint cause of action has ever existed or does now exist in favor of the plaintiff and against petitioner in connection with the said Warner Stinson.

And your petitioner offers herewith a good and sufficient surety for the entering in the District Court of the United States for the Southern Division of the Northern District of Alabama on the first day of its next session, a copy of the record of this suit and for the payment of all costs that may be awarded by the said District Court if said Court shall hold that this suit was frongfully or improperly removed thereto.

Petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said District Court of the United States for the
6 Southern Division of the Northern District of Alabama.

REPUBLIC IRON & STEEL COMPANY.
By PERCY, BENNERS & BURR,
Its Attorneys of Record.

STATE OF ALABAMA,
Jefferson County:

Before me, a Notary Public, in and for said County in said State, personally appeared James Rice who being by me first duly sworn, says he is attorney for the petitioner and authorized to make this affidavit on its behalf; that the facts stated in the foregoing petition are true.

JAMES RICE.

Sworn to and subscribed before me this the 23rd day of April, 1918.

SUDIE S. BATES,
Notary Public. [SEAL.]

Presented to me this the 24th day of April, 1918

C. B. SMITH,
Judge of Circuit Court of Jefferson County, Alabama.

STATE OF ALABAMA,
Jefferson County:

It appearing to the Court from the petition of the defendant, Republic Iron & Steel Company that the above entitled cause should be removed to the District Court of the United States for the Southern Division of the Northern District of Alabama, it is therefore ordered and adjudged that the said cause be and the same hereby is removed to the District Court, and that the Clerk of this Court send the record in the cause to said Court on or before the first day of the next term thereof.

Done at Birmingham, Ala., this the 24th day of April, A. D. 1918.

C. B. SMITH,
Judge of Circuit Court of Jefferson County, Alabama.

7 We hereby certify that we have given notice of these proceedings to the plaintiff in the case by serving an exact copy hereof on W. A. Denson, Attorney of Record for plaintiff, on this the 24th day of April, 1918.

PERCY, BENNERS & BURR,
Attorneys for Petitioner.

STATE OF ALABAMA,
Jefferson County:

Know all men by these presents: that we, Republic Iron & Steel Company, as principal, and Augustus Benners and Borden Burr, as sureties are held and firmly bound unto Beter Wilson his heirs, representatives and assigns in the penal sum of One Thousand Dollars, for the payment whereof well and truly to be made, we bind ourselves, our heirs, representatives and assigns, jointly and severally firmly by these presents.

The condition of this bond is such that; whereas, the said Republic Iron & Steel Company has petitioned the Honorable Circuit Court of Jefferson County, Ala., for the removal of a certain cause therein pending wherein the said Beter Wilson is plaintiff, and the Republic Iron and Steel Company is defendant, to the District Court of the United States for the Southern Division of the Northern District of Alabama; and whereas, said petition has been granted and an order of removal made by said Court;

Now, if the Republic Iron & Steel Company shall enter in said District Court of the United States for the Southern Division of the Northern District of Alabama on the first day of its next session, a copy of the record in said cause and shall well and truly pay all costs that may be awarded by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto; then, this obligation to be void; otherwise to remain in full force and virture.

In witness whereof, the Republic Iron & Steel Company, a corporation, and Augustus Benners and Borden Burr have hereunto set their hands and seals this 23rd day of April, 1918.

8 REPUBLIC IRON AND STEEL COMPANY,
By PERCY, BENNERS & BURR,
Southern Counsel.

A. BENNERS,
BORDEN BURR.

Approved April 24, A. D. 1918,
C. B. SMITH,
Judge of the Circuit Court of
Jefferson County, Alabama.

Filed in office April 24, 1918.

WM. J. WALDROP,
Clerk.

THE STATE OF ALABAMA,
Jefferson County:

Circuit Court.

I, Wm. J. Waldrop, Clerk of the Circuit Court of the Tenth Judi-
ıl Circuit of Alabama, do hereby certify that the foregoing pages
ımbered from one to eight contains a full, true and correct copy
the Summons and Complaint, Sheriff's Return, Petition for
ɜmoval, Order for Removal, Affidavit and Bond for Removal, all
which appears of record of said Court, and all of which I hereby
rtify to the District Court of the United States for the Southern
ivision of the Northern District of Alabama.
I further certify that all the costs which have accured in this

Witness my hand and seal of said Court, this the 26th day of
pril, 1918.

WM. J. WALDROP,
Clerk of the Circuit Court of the Tenth
Judicial Circuit of Alabama.

Demurrers.

Filed May 2, 1918. Chas. J. Allison, Clerk.

ı the United States Court for the Northern District of Alabama,
Southern Division.

BETER WILSON, Plaintiff,

vs.

EPUBLIC IRON AND STEEL CO., & WARNER STINSON, Defendants.

Comes the defendants, separately and severally, and for demurrer
plaintiff's complaint, and separately and severally to each count
ereof, files separately and severally the following causes of de-
urrer:

1. It does not appear that defendant has violated any duty which
owed the plaintiff.

2. No facts are set forth which show, as a matter of law, that
ıy duty to the plaintiff was devolved upon defendant which it has
ɔlated.

3. It does not sufficiently appear that plaintiff, when he received the injuries complained of, was engaged in the performance of the necessary duties of his employment.

4. The relation existing between plaintiff and defendant at the time such injuries were received is not sufficiently set forth or described.

5. It does not sufficiently appear that there was any causal connection between the injuries received by plaintiff and the alleged negligence complained of.

6. It does not appear, except as a conclusion of the pleader, that defendant or its servants or agents for whose acts it was legally responsible were guilty of any negligence.

7. The alleged negligence of the servants or agents charged with negligence is not sufficiently set forth or described in said complaint.

8. The facts set forth in said complaint as constituting negligence on the part of the defendant or its servants or agents do not, as a matter of law, charge negligence.

9. It does not sufficiently appear from said complaint that at the time said servants or agents of defendant committed the acts complained of, the defendant was then legally liable to the plaintiff on account of the commission of such acts.

10. It does not appear that at the time the agents or servants of the defendant committed the acts of negligence complained of, that such servants or agents were then acting within the line and scope of their employment by the defendant.

11 11. From aught that appears from said complaint plaintiff's injuries were proximately caused by reason of the negligence of a fellow servant.

12. The alleged negligence of the superintendent of the defendant charged with negligence is not sufficiently set forth or described.

13. The alleged defect in the condition of the ways, works, machinery or plant used in or connected with the business of the defendant is not sufficently set forth or described.

14. It does not appear as a matter of law that there was a defect in the condition of the ways, works, machinery or plant connected with or used in the business of the defendant.

15. It does not appear with sufficient certainty what duty the defendant owed to the plaintiff.

16. For that the averments of said count do not constitute actionable negligence.

PERCY, BENNERS & BURR,
Attorneys for Defendants.

Motion to Remand.

he United States District Court for the Southern Division of the Northern District of Alabama.

BETER WILSON, Plaintiff,

vs.

EPUBLIC IRON AND STEEL COMPANY, a Body Corporate, et al., Defendants.

ow comes the plaintiff in the above entitled cause by his attor- of record and, appearing for this purpose and on other, moves Court to remand the cause to the Circuit Court of Jefferson nty, State of Alabama, and for grounds for the granting of said ion assigns the following:

his cause was originally instituted in the Circuit Court of Jeffer- County, State of Alabama, and Warner Stinson, one of the co- ndants in said cause was made an original party defendant at time of the institution of said suit, and said Warner Stinson was ne time of the institution of said suit a citizen of Jefferson County, e of Alabama.

laintiff avers all said facts were known to the defendant before cause was removed to this Court, and said removal was made the express purpose of delaying plaintiff in the trial of said cause. ntiff avers he has been put to great expense, and has been delayed he trial of said cause not less than twelve months by said wrong- removal of said cause to this Court. Wherefore, plaintiff prays cause be remanded to said Circuit Court of Jefferson County, e of Alabama, and that plaintiff be allowed such damages against defendants and their bondsmen as shall in equity and good science be deemed just by this Honorable Court, for the addi- al expense and delay caused plaintiff by said wrongful removal aid cause from said State Court.

W. A. DENSON,
Attorney for Plaintiff.

Court Record.

the United States District Court for the Southern Division of the Northern District of Alabama.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON AND STEEL COMPANY, a Body Corporate, and WARNER STINSON, Defendants.

Saturday, October 5th, 1918.

This cause coming on to be heard, come the plaintiff herein by nsel and the defendants by counsel. And the motion of Beter

Wilson to remand this cause to the Circuit Court of Jefferson County, from whence it was removed to this Court, which motion having been argued by counsel and considered by the Court, and the Court being of the opinion that the grounds of said motion are not well taken, doth overrule the same, to which the plaintiff excepts.

14 . *Motion of Defendant.*

Filed Oct. 5, 1918. Chas. J. Allison, Clerk.

In the United States District Court for the Northern District of Alabama, Southern Division.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON & STEEL COMPANY and WARNER STINSON, Defendants.

Comes the defendant, Republic Iron & Steel Company, and shows the court that, heretofore, on, to-wit: July 20th, 1917, this same plaintiff filed a suit in the Circuit Court of Jefferson County, Alabama, a court of competent jurisdiction, on this same cause of action against this same defendant, Republic Iron & Steel Company, and that thereafter the said suit was regularly removed to this Honorable Court, and that during the month of March, 1918, plaintiff in the present suit, who was plaintiff in the suit referred to, took a voluntary non-suit in the said cause, and the costs of said suit were adjudged and decreed against the plaintiff, and said costs have not been paid by the plaintiff.

Defendant says that the suit wherein plaintiff took a voluntary non-suit was in all respects on the same cause of action herein sued on, and was by this same plaintiff against this same defendant, Republic Iron & Steel Company, and that the only difference between that suit and the suit now pending is that the name of Warner Stinson has been added in the present suit as a party defendant.

Wherefore defendant prays that the court will stay the prosecution of this cause against defendant, Republic Iron & Steel Company, until said costs of said suit above mentioned have been paid, and that the court will set a day within a reasonable time within which the said costs may be paid, and order that in default of the payment of said costs this present suit shall stand dismissed.

PERCY, BENNERS & BURR,
Attorneys for Defendant
Republic Iron & Steel Company.

To the Plaintiff, Beter Wilson, or W. A. Denson, Esq., his attorney of Record:

Take notice that the above motion will be called to the attention of the court upon October 5th, 1918.

PERCY, BENNERS & BURR,
Attorneys for Defendant
Republic Iron & Steel Company.

We hereby certify that a copy of the above motion was served on W. A. Denson, attorney of record for plaintiff on this the 5th day of October, 1918.

PERCY, BENNERS & BURR,
Attorneys for Defendant,
Republic Iron & Steel Company,

Filed Oct. 19, 1918. Chas. J. Allison, Clerk.

In the District Court of the United States for the Northern District of Alabama, Southern Division.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON & STEEL COMPANY and WARNER STINSON, Defendants.

Motion of the defendants praying the court to stay the prosecution of this cause against the defendant, Republic Iron & Steel Company, until the payment of the costs of a former suit brought by this same plaintiff against the Republic Iron & Steel Company on this same cause of action, coming on to be heard, both the plaintiff and the defendants being present in court by counsel, and said motion being now considered by the Court,

It is ascertained by the court, and is the judgment of the court, that the facts as set forth in said motion are true and that the defendants should be entitled to the relief therein prayed for;

It is, therefore, ordered, adjudged and decreed by the court that further proceedings in this case be and the same hereby are stayed until the costs of said former suit of Beter Wilson vs. Republic Iron & Steel Company in this Court, being cause No. 2258 herein, which accured at the instance of defendants in this case, are paid, and that this plaintiff as a condition precedent to the further prosecution of said suit be required to pay said costs in full on or before the first day of the next term of this court. That upon his failure to pay said costs on or before such day that this cause stand dismissed without further order. Plaintiff excepts to the granting of the motion.

This the 19th day of October, 1918.

W. I. GRUBB,
Judge.

17 *Order Dismissing.*

In the District Court of the United States for the Northern District of Alabama, Southern Division.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON AND STEEL COMPANY and WARNER STINSON, Defendants.

Monday, April 14th, 1919.

It *appeared* to the Court that the plaintiff herein did not pay costs by March 1st, 1919, according to a former order made in this cause, it is therefore ordered by the Court that this cause be and the same is thereby dismissed.

18 In the District Court of the United States for the Southern Division of the Northern District of Alabama.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON AND STEEL COMPANY, a Body Corporate, Defendant. WARNER STINSON, Defendants.

Bill of Exceptions.

Be it remembered that at the September term of the District Court of the United States for the Southern Division of the Northern District of Alabama, this cause coming on to be heard, the following proceedings were had and done. Immediately upon the trial court sounding this cause upon the docket plaintiff's counsel appearing specially for this purpose and no other and without waiving any rights of the plaintiff to object to the jurisdiction of the Court stated to the Court there was on file in the cause the following motion:

"In the United States District Court for the Southern Division of the Northern District of Alabama.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON AND STEEL COMPANY, a Body Corporate, Defendant.

Now comes the plaintiff in the above entitled cause by his attorney of record and, appearing for this purpose and no other, moves the Court to remand the cause to the Circuit Court of Jefferson County,

State of Alabama, and for grounds for the granting of said motion assigns the following:

This cause was originally instituted in the Circuit Court of Jefferson County, State of Alabama, and Warner Stinson, one of the co-defendants in said cause was made an original party defendant at the time of the institution of said suit, and said Warner Stinson was at the time of the institution of said suit a citizen of Jefferson County, State of Alabama.

Plaintiff avers all of said facts were known to the defend-
19 ant before said cause was removed to this Court, and said removal was made for the express purpose of delaying plaintiff in the trial of said cause. Plaintiff avers he has been put to great expense, and has been delayed in the trial of said cause not less than twelve months by said wrongful removal of said cause to this Court. Wherefore, plaintiff prays said cause be remanded to said Circuit Court of Jefferson County, State of Alabama, and that plaintiff be allowed such damages against defendants and their bondsmen as shall in equity and good conscience be deemed just by this Honorable Court, for the additional expense and delay caused plaintiff by said wrongful removal of said cause from said State Court.

W. A. DENSON,
Attorney for Plaintiff."

Thereupon the Court inquired of the defendants if they contested said motion and at the same time stating to the defendants that the Court was of the opinion said motion should be granted. The defendants stated to the Court they desired to contest the motion and asked the Court's permission to argue the question. Thereupon the Court set the motion down for a hearing on the 5th day of October 1918. On said date the defendants argued said motion to the Court but introduced no evidence whatsoever, the plaintiff admitting in open Court that the defendant, the Republic Iron and Steel Company, a corporation, was a citizen of the State of New Jersey, and that the plaintiff and defendant, Warner Stinson, were residents of the State of Alabama, and that the matter in dispute involved more than $3000.00. After hearing the argument of the defendants the Court was of the opinion, upon the record and the concessions stated as to citizenship of parties and jurisdictional amount, that said motion to remand was not well taken and should be overruled, and the Court thereupon entered the following order and judgment:

"October 5th, 1918.

This cause coming on to be heard, came the plaintiff herein by counsel, and the defendant by counsel, and the motion of Beter Wilson to remand this cause to the Circuit Court of Jefferson County,
from whence it was removed to this Court, which motion
20 having been argued by counsel and considered by the Court, and the Court being of the opinion that the grounds of said

motion are not well taken, doth overrule the same to which the plaintiff excepts.

W. I. GRUBB,
Judge."

The plaintiff duly and legally excepted to said order and judgment of the Court overruling said motion to remand. Thereafter the defendants made the following motion before said Court:

"Comes the defendant, Republic Iron & Steel Company, and shows to the Court that, heretofore, on, to-wit: July 20th, 1917, this same plaintiff filed a suit in the Circuit Court of Jefferson County, Alabama, a court of competent jurisdiction, on this same cause of action against this same defendant, Republic Iron & Steel Company, and that thereafter the said suit was regularly removed to this Honorable Court, and that during the month of March, 1918, plaintiff in the present suit, who was plaintiff in the suit referred to, took a voluntary non-suit in the said cause, and the costs of said suit were adjudged and decreed against the plaintiff, and said costs have not been paid by the plaintiff.

Defendant says that the suit wherein plaintiff took a voluntary non-suit was in all respects on the same cause of action herein sued on, and was by this same plaintiff against this same defendant, Republic Iron & Steel Company, and that the only difference between that suit and the suit now pending is that the name of Warner Stinson has been added in the present suit as a party defendant.

Wherefore defendant prays that the Court will stay the prosecution of this cause against defendant, Republic Iron & Steel Company, until said costs of said suit above mentioned have been paid, and that the court will set a day within a reasonable time within which the said costs may be paid, and order that in default of the payment of said costs this present suit shall stand dismissed.

PERCY, BENNERS & BURR,
Attorney- for the Defendant
Republic Iron & Steel Co.

To the Plaintiff, Beter Wilson, or W. A. Denson, Esq., his attorney of Record:

21 Take notice that the above motion will be called to the attention of the court upon October 5th, 1918.

PERCY, BENNERS & BURR,
Attorney- for the Defendant
Republic Iron & Steel Co.

We hereby certify that a copy of the above motion was served on W. A. Denson, attorney of record for plaintiff on this the 5th day of October, 1918.

PERCY, BENNERS & BURR,
Attorney- for the Defendant
Republic Iron & Steel Co."

At the hearing of said motion plaintiff appeared solely for the purpose of objecting to the jurisdiction of said Court and made said objection. The Court overruled said objection of the plaintiff and proceeded to hear said motion over the objection and exception of the plaintiff. The plaintiff then and there duly and legally excepted to the Court overruling plaintiff's objection to the jurisdiction of the Court. The Court entered the following order and judgment upon said motion of the defendants:

"Motion of the defendants praying the court to stay the prosecution of this cause against the defendant, Republic Iron & Steel Company, until the payment of the costs of a former suit brought by this same plaintiff against the Republic Iron & Steel Company on this same cause of action, coming on to be heard, both the plaintiff and the defendant- being present in court by counsel, and said motion being now considered by the Court,

It is ascertained by the Court, and is the judgment of the court, that the facts as set forth in said motion are true and that the defendant- should be entitled to the relief therein prayed for;

22 It is therefore, ordered, adjudged and decreed by the court that further proceedings in this case be and the same hereby are stayed until the costs of said former suit of Beter Wilson vs. Republic Iron & Steel Company in this court, being cause No. 2258 herein, which accrued at the instance of defendant- in this case are paid, and that this plaintiff as a condition precedent to the further prosecution of said suit be required to pay said costs in full on or before the first day of the next term of this court. That upon his failure to pay said costs on or before such day that this cause stand dismissed without further order. Plaintiff excepts to the granting of the motion. This the 19th day of October, 1918.

W. I. GRUBB,
Judge."

Thereupon the plaintiff then and there duly and legally excepted to said order and judgment of the Court. Thereafter on April 14, 1919, the Court entered the following order and judgment in said cause:

"April 14, 1919.

It appearing to the court that the plaintiff herein did not pay costs by March 1, 1919, according to a former order made in this cause, it is therefore ordered by the court that this cause be, and the same is hereby dismissed.

W. I. GRUBB,
Judge."

The plaintiff then and there duly and legally excepted to said order of the Court, and now comes the plaintiff and presents to this Honorable Court his true and lawful bill of exceptions and prays that the same be signed and sealed and made a part of the record in this cause which is accordingly done on this 5th day of July, 1919.

W. I. GRUBB,
United States District Judge for the Northern District of Alabama.

23 In the United States District Court for the Southern Division of the Northern District of Alabama.

BETER WILSON, Plaintiff,

vs.

REPUBLIC IRON AND STEEL COMPANY, a Body Corporate, and WARNER STINSON, Defendants.

Certificate of Trial Judge that the Only Question Appealed from is One of Jurisdiction Solely.

To the Honorables the Justices of the Supreme Court of the United States:

I, the undersigned William I. Grubb, United States District Judge for the Northern District of Alabama, do hereby certify that the only question upon this appeal to be submitted to the Supreme Court of the United States is the question of the jurisdiction of the United States District Court for the Northern District of Alabama to retain said cause for adjudication. The question of jurisdiction arose in the following manner: the plaintiff, Beter Wilson, filed a suit in the Circuit Court of Jefferson County, State of Alabama, jointly against his employer, the defendant Republic Iron and Steel Company, a resident of the State of New Jersey, and the defendant Warner Stinson a resident of the State of Alabama, a co-employee, entrusted with superintendence over plaintiff. The suit was instituted under the Third Subdivision of the Employers' Liability Act of Alabama, and was for the purpose of recovering damages for the plaintiff for personal injuries received while in the active performance of the duties of his employment, by the defendant the Republic Iron and Steel Company, and proximately caused by the negligence of said defendant Stinson in the exercise of the superintendence aforesaid. The defendant, Republic Iron and Steel Company, filed petition and bond for removal to the Federal Court, alleging separable controversy and fraudulent joinder. The State Court granted the petition of removal as matter of course because of the allegation of fraudulent joinder. On the call of cause for trial in the Federal Court the plaintiff, appearing solely for the purpose of objecting to the jurisdiction of the Federal Court, filed a motion to remand the cause upon the ground that the Federal Court was without jurisdiction to try the

24 cause, it having been improperly removed to said court because there was joined with the defendant Republic Iron and Steel Company the defendant Warner Stinson who was then, and also at the time of the institution of the suit, a citizen of the State of Alabama. The Federal Court overruled the motion to remand. The sole question upon this appeal therefore, as we see it, is whether or not the District Court erred in overruling plaintiff's motion to remand the cause to the State Court. In testimony whereof I have hereunto set my hand this August 23, 1919, being done at the same term of Court at which said judgment was *reduced*.

Respectfully submitted,

W. I. GRUBB,
District Judge.

25 In the United States District Court for the Southern Division of the Northern District of Alabama.

BETER WILSON, Plaintiff in Error,

vs.

REPUBLIC IRON AND STEEL COMPANY, a Body Corporate, and WARNER STINSON, Defendants in Error.

Comes now the plaintiff in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of writ of error in the above-entitled cause.

First. Said Court erred in overruling plaintiff's motion to remand said cause to the Circuit Court of Jefferson County, State of Alabama.

Second. Said Court erred in ordering plaintiff to pay cost of former suit upon penalty of having the present suit dismissed.

Third. Said Court erred in rendering judgment in this cause dismissing plaintiff's suit for failure to pay costs of former suit.

Fourth. Said Court erred in assuming jurisdiction of this cause of action.

Fifth. Said Court erred in deciding it had jurisdiction of this cause of action.

Respectfully submitted,

W. A. DENSON,
Att'y for Pl'ff in Error.

Presented this 23rd day of August 1919.

W. I. GRUBB,
District Judge.

26 In the Supreme Court of the United States.

BETER WILSON, Appellant,

vs.

REPUBLIC IRON AND STEEL COMPANY and WARNER STINSON, Appellees.

To the Honorable Judges of the Supreme Court of the United States:

Now comes Beter Wilson, plaintiff in error, and petitions this Honorable Court to allow a writ of error to be directed to the United States District Court for the Southern Division of the Northern District of Alabama, to remove to this, the Supreme Court of the United States, for a review thereof, the record in the case lately pending in said Court below, wherein above-named plaintiff in error was plaintiff and the above-named defendants in error were defendants, and

particularly the record of the judgment rendered by said Distr
Court in the said cause, wherein the said Court below dismissed t
plaintiff in error's cause of action out of said court at his costs; s
judgment was duly entered on record therein on the Fourteenth D
of April, 1919; that plaintiff be allowed to perfect this appeal wi
out filing a bond as required by law, and without costs and fees
the clerk or other officers of this Court upon his affidavit made a
filed in this cause according to law.

Your petitioner respectfully states that he has this day filed he
with his assignment of errors committed by the Court below in s
cause, and intended to be urged by your petitioner and plaintiff
error in the prosecution of this his suit in error.

Dated June 20th, 1919.

BETER WILSON.
W. A. DENSON,
Attorney for Plaintiff in Error.

Let a writ of error in the above cause issue as prayed for in t
petition.

W. I. GRUBB,
United States District Judge for
the Northern District of Alabama.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge
the District Court of the United States for the Northern Distr
of Alabama, Greeting:

Because, in the record and proceedings, as also in the renditi
of the judgment of a plea which is in the said District Court bef
you, between Beter Wilson, plaintiff, and Republic Iron and St
Company, a body corporate, and Warner Stinson, defendants,
manifest error hath happened, to the great damage of the said pla
tiff, Beter Wilson, as by his complaint appears. We being willi
that error, if any hath been, should be duly corrected, and full a
speedy justice done to the parties aforesaid in this behalf, do co
mand you, if judgment be therein given, that then under your s
distinctly and openly, you send the record and proceedings afo
said, with all things concerning the same, to the Supreme Court
the United States, together with this writ, so that you have the sa
at Washington, within thirty days from the date hereof, in the s
Supreme Court, to be then and there held, that the record and p
ceedings aforesaid being inspected, the said Supreme Court m
cause further to be done therein to correct that error, what of rig
and according to the laws and customs of the United States, shou
be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 8th day of July, in the year of our Lord one thousand nine hundred and nineteen.

CHAS. J. ALLISON,
Clerk of the U. S. District Court,
Nor. District of Alabama.

Allowed by:
W. I. GRUBB,
District Judge.

July 8th, 1919.

28 *Bond.*

Know all Men by these Presents, That we, Beter Wilson, as principals, and W. A. Denson and United States Fidelity & Guaranty Company, a Corporation of Baltimore, Maryland, as sureties, are held and firmly bound unto Republic Iron and Steel Company and Warner Stinson in the full and just sum of Two Hundred and Fifty Dollars, to be paid to the said Republic Iron and Steel Company and Warner Stinson their certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this — day of August, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a Regular Term of the District Court of the United States, for the Southern Division of the Northern District of Alabama, in a suit pending in said Court between Beter Wilson, as Plaintiff, and Republican Iron and Steel Company and Warner Stinson, as Defendants, a judgment was rendered against the said Beter Wilson and the said Beter Wilson having obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said Court to reverse the Judgment in the aforesaid suit, and a citation directed to the said Republic Iron & Steel Company and Warner Stinson citing and admonishing them to be and appear at The United States Supreme Court, to be holden at Washington, D. C., within thrity days from the date thereof.

Now, the Condition of the Above Obligation is Such, That if the said Beter Wilson shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

BETER WILSON. [SEAL.]
W. A. DENSON. [SEAL.]
UNITED STATES FIDELITY &
GUARANTY CO., [SEAL.]
By C. S. GANDY, [SEAL.]
Att'y in Fact. [SEAL.]

Sealed and delivered in presence of

——— ———.
——— ———.

Approved by:
W. I. GRUBB,
District Judge.

August 22, 1919.

Filed August 22nd, 1919. Chas. J. Allison, Clerk.

29 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to Republic Iron and Steel Company, a body corporate, and Warner Stinson, or their attorneys of record, Messrs. Percy, Benners & Burr, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fifth Judicial Circuit to be holden at New Orleans, La.

Pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern Division of the Northern District of Alabama, wherein Beter Wilson is Plaintiff in Error and you are Defendant- in Error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 23rd day of August in the year of our Lord One Thousand Nine Hundred and Nineteen.

[SEAL.] W. I. GRUBB,
District Judge.

Endorsed.

Returned not executed on account of no deposit or bond being made to cover the expense of service. This 2nd day of September, 1919.

H. A. SKEGGS,
U. S. Marshal,
By FRANK J. DAVIS,
Deputy.

Executed the within Citation by handing a copy of within citation to Salem Ford, of firm of Percy, Benners & Burr (at instance of Borden Burr) who accepted said service, this the 3rd day of September, 1919.

H. A. SKEGGS,
U. S. Marshal,
By ROBT. A. MORRIS,
Deputy.

30 THE UNITED STATES OF AMERICA,
Northern District of Alabama:

I, Chas. J. Allison, Clerk of the District Court of the United States for the Southern Division of the Northern District of Alabama, do hereby certify that the foregoing pages numbered from one (1) to twenty-nine (29) is a full, true and correct transcript of the record in the matter of Beter Wilson, Plaintiff in Error, versus Republic Iron & Steel Company and Warner Stinson, Defendants in Error, as fully as the same appears of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Birmingham, on this *this* 3rd day of September, 1919.

[Seal U. S. District Court, Nor. Dist. Ala.]

CHAS. J. ALLISON,
Clerk U. S. District Court, Northern District of Alabama.

Endorsed on cover: File No. 27,319. N. Alabama D. C. U. S. Term No. 564. Beter Wilson, plaintiff in error, vs. Republic Iron and Steel Company and Warner Stinson. Filed October 6th, 1919. File No. 27,319.

COPY BOUND CLOSE IN CENTER

FILE COPY

No. 564

OCT 25 1919
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

BETER WILSON,

Plaintiff in Error,

vs.

REPUBLIC IRON AND STEEL COMPANY, A BODY CORPORATE, AND WARNER STINSON,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

BETER WILSON,

Plaintiff in Error,

vs.

REPUBLIC IRON AND STEEL COMPANY, A BODY CORPORATE, AND WARNER STINSON,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

W. A. DENSON, Birmingham, Ala.,

Attorney for Plaintiff in Error.

STATEMENT OF CASE.

Beter Wilson, plaintiff in error, was, at the time of the injuries complained of, an employee of the defendant in error, Republic Iron and Steel Company. The negligence of Warner Stinson, a co-employee, in authority over plaintiff in error, proximately caused the injuries complained of, and for this, and the additional reason of preventing removal of the cause to the Federal Court, plaintiff in error made said Warner Stinson one of the parties defendant to the cause of action. The defendant in error, Republic Iron and Steel Company, filed a petition and bond in the Circuit Court of Jefferson County, where said suit was instituted and was pending, seeking to remove the cause to the United States District Court for the Southern Division of the Northern District of Alabama. The petition alleged fraudulent joinder and separable controversy as grounds for removal. Because of the allegations of fraudulent joinder the State Court knowing such issue could be tried only in the Federal Court, granted the petition and the cause was removed. Thereafter when the cause was reached for trial in the Federal Court the plaintiff in error appearing solely for that purpose and without waiving the question of jurisdiction filed a motion to remand the cause to the State Court, denying that there was any fraudulent joinder, insisting that the complaint alleged a joint cause of action, that the cause had been improperly removed, and for that reason the Federal Court was without jurisdiction to proceed. There was no fraudulent joinder, neither was there any evidence of any, and for the sole reason that the complaint, in the opinion of the Federal Court, alleged a separable controversy and failed to state a joint cause of action, the Federal Court overruled the motion to remand of the plaintiff in error and endeavored to retain jurisdiction of the cause, making an order therein requiring the plaintiff in error to pay the costs of a former

suit within a certain time or the cause to stand dismissed. Within three months from the time the order of dismissal was entered and made final, plaintiff in error sued out a writ of error to this Court and at the same term at which the final judgment of dismissal was entered he obtained a certificate of the trial judge that the question of jurisdiction is the only question presented by the record in this cause to be reviewed by this Court.

SPECIFICATIONS OF ERRORS RELIED UPON.

The errors committed by the trial court and relied upon by plaintiff in error to reverse this cause are:

First—The order of the trial court overruling plaintiff's motion to remand the cause to the State Court.

Second—The order of the trial court requiring plaintiff to pay costs of former suit.

Third—The order of the trial court dismissing the cause for failure of plaintiff to pay costs of former suit.

ARGUMENT.

The resident defendant, Warner Stinson, was properly joined as a party defendant with the non-resident defendant, Republic Iron and Steel Company.

L. & N. R. R. Co. vs. Abernathy, 197 Ala. 516-535, and authorities there cited.

Charman vs. Lake Erie & W. R. Co., 105 Fed. 449.

Republic Iron & Steel Co. vs. Lee, 227 Ill. 246; 81 N. E. 411.

Coalgate Co. vs. Brass, 25 Okla. 244.

Lake Erie & W. R. Co. vs. Charman, 161 Ind. 95; 67 N. E. 923.

Mayberry vs. Northern P. R. R. Co., 100 Minn. 79; 12 L. R. A. (N. S.) 675; 10 Ann. Cases 754.

The mere fact that a Federal Court has held to the contrary, as in the case of **Warax vs. Cin., N. O. & T. P. R. Co.**, 72 Fed. 637, is not at all conclusive of the right of removal. The Supreme Court of the United States has held that this is a question of State law and that it would not go behind the decision of the highest court of the State.

Chicago, R. I. & P. R. Co. vs. Schwyhart, 227 U. S. 193; 57 L. E. 477.

Even though it could be successfully contended on special demurrer that the complaint failed to allege a cause of action against the resident defendant, Stinson, this would not constitute ground for removal.

Chicago, R. I. & P. R. Co. vs. Schwyhart, 227 U. S. 194; 57 L. E. 478.

Whether there was a joint liability or not, was a question to be determined upon the averments of the plaintiff's statement of his cause of action, and is a question for the State Court to decide. In no event could it constitute ground for removal.

Chicago, R. I. & P. R. Co. vs. Dowell, 229 U. S. 113; 57 L. E. 1095-1096.

The mere fact that the defendant Republic Iron and Steel Company was liable by virtue of the employee's liability statutes of Alabama and the defendant Stinson was liable at common law presented no ground for removal.

Chicago, R. I. & P. R. Co. vs. Dowell, 229 U. S. 113; 57 L. E. 1096.

So. Ry. Co. vs. Miller, 217 U. S. 215-216, 54 L. E. 736.

The fact that a prior suit had been brought in the State Court against the non-resident defendant solely and subsequently dismissed in the Federal Court, after removal thereto, has been held by this Court to present no ground whatever for removal.

So. Ry. Co. vs. Miller, 217 U. S. 216-217; 54 L. E. 736.

The allegation in the petition that the defendant Stinson was a pauper and the responsibility of the non-resident defendant unquestioned affords no ground of removal.

Chicago, R. I. & P. R. Co. vs. Dowell, 229 U. S. 113-114; 57 L. E. 1096.

The allegation of the petition that it was the intent and purpose of the plaintiff in joining the resident defendant Warner Stinson, to prevent the removal of the cause to the Federal Court, affords no ground for removal.

Chicago, R. I. & P. R.. Co. vs. Schwyhart, 227 U. S. 193; 57 L. E. 477-478.

Chicago, R. I. & P. R. Co. vs. Whiteaker, 239 U. S. 424-425; 60 L. E. 364.

The allegations of fraudulent joinder in the petition amount to no more than a traverse of the cause of action set forth in the complaint. Under the allegation of the complaint the non-resident defendant could only be liable provided the resident defendant was guilty as charged. hence the allegation of the petition denying Warner Stinson's participation as alleged in the complaint manifestly go to the merits of the action in its entirety, and not to the joinder; that is to say, it indicates that the plaintiff's case is ill founded as to all of the defendants.

Chicago, R. I. & P. R. Co. vs. Whiteaker, 239 U. S. 425; 60 L. E. 364.

The allegation of the petition, that the cause of action existing between plaintiff and petitioner is separable and can be properly tried and adjudicated without the presence of any other party defendant, is without any merit to afford ground of removal. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. It is recognized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election. If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal. The plaintiff may elect his own method of attack, and the case which he makes in his complaint, being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal. The fact that the plaintiff may have misconceived his cause of action and has no right to prosecute the defendants jointly does not render the controversy separable within the meaning of the Act of Congress.

Chicago, R. I. & P. R. Co. vs. Willard, 220 U. S. 425-427, 55 L. E. 526-527.

There was no evidence introduced upon the trial of the motion and the bill of exceptions so states. The bill of exceptions also states that the trial court overruled the motion solely upon the record and no other evidence. There was no attempt made by the defendant to prove the allegations of the petition in respect to fraudulent joinder. Such allegation must not only be made in the petition but must also be proven in order to be of any

avail to the party making them. Not only were the allegations of fraudulent joinder insufficient as shown by the above authorities but there was also no attempt made to prove the allegations as made.

L. & N. R. R. Co. vs. Wangelin, 132 U. S. 599-603, 33 L. E. 476-477.

Chesapeake & O. R. Co. vs. Cockrell, 232 U. S. 153-154, 58 L. E. 547-548.

Plymouth Con. Gold Min. Co. vs. Amador, Etc. Canal Co., 118 U. S. 264-271, 30 L. E. 234.

It is respectfully submitted the judgment of the trial court dismissing the plaintiff's cause of action should be reversed and held for naught and said court be instructed by this Court to remand said cause to the State Court from which it has been wrongfully removed by the defendant in error and that all costs of this appeal should be taxed against said defendant and the plaintiff in error be allowed such damages for such wrongful removal as has been imposed upon him and incurred by him in defending said wrongful removal and also for the delay in the prosecution of the cause produced by said wrongful removal of the cause from the State Court.

Respectfully submitted,

W. A. Dinsmore,

Att'y. for Pl'ff. in Error.

I hereby certify I have heretofore served upon counsel for the defendant in error copies of the foregoing brief and argment.

W. A. Dinsmore,

Att'y. for Pl'ff. in Error.

In the Supreme Court of the United States.

No. 564.

PETER WILSON,
Plaintiff in Error,

vs.

REPUBLIC IRON & STEEL COMPANY, and WARNER STINSON,
Defendants in Error.

STATEMENT OF THE CASE

The insufficiency and inaccuracy of the statement of the case by the plaintiff in error necessitates the following statement:

Plaintiff in error, hereinafter termed plaintiff, filed suit in the State Court against the defendant in error, Republic Iron & Steel Company, hereinafter termed the defendant, for injuries received while in defendant's employment. This suit was duly removed by the defendant, a foreign corporation, to the United States Court. Thereafter, in the United States Court, plaintiff took a voluntary non-suit. He then filed suit on the same cause of action in the State Court against the Republic Iron & Steel Company, joining as party defendant Warner Stinson, a resident of Alabama.

The alleged cause of action against the defendant, Republic Iron & Steel Company, was based in the Employer's Liability Act of Alabama on account of a negligent order of a superior employe of the defendant, Republic Iron & Steel Company. The alleged cause of action against defendant, Warner Stinson, was at common law, based on the giving of a negligent order by Warner Stinson.

Thereupon, defendant, Republic Iron & Steel Company, filed a petition for removal of the case to the United States Court, alleging a separable controversy and fraudulent joinder. The State Court granted the petition for removal. Thereupon, plaintiff made a motion in the United States Court to remand the case to the State Court. This motion was overruled in the United States Court.

Defendant, Republic Iron & Steel Company, made a motion in the United States Court to stay the prosecution of this latter case until the costs in the first case had been paid, praying that in default of payment of such costs within a reasonable time that the case be dismissed. This motion was granted by the court, the court ordering that the costs be paid on or before the first day of the next term of the court. These costs not being paid by such time, the court then made the following order: "It appeared to the court that the plaintiff herein did not pay costs by March 1, 1919, according to a former order made in this cause. It is therefore ordered by the court that this cause be and the same is hereby dismissed." (Transcript of record, page 12.)

No further proceedings were had in this cause until the suing out by the plaintiff of this writ of error. We find no warrant in the record for the statement by plaintiff in his brief "and for the sole reason that the complaint in the

opinion of the Federal Court alleged a separable controversy and failed to state a joint cause of action, the Federal Court overruled the motion to remand of the plantiff in error * * *" (See certificate of District Judge, page 16 of the transcript of record.)

ARGUMENT

A

There was no final judgment in this case to support a writ of error. It is fundamental that the writ of error may not be sued out in the absence of a final judgment.

McLish v. *Roff*, 141 U. S. 661, 35 Law. Ed. 893.

1. The overruling of the motion to remand is not reviewable by writ of error.

Bender v. *Pennsylvania Co.*, 148 U. S. 502, 37 Law Ed. 537.

2. The order of the District Court dismissing the case for failure of plaintiff to pay the costs in the former suit is not a final judgment. For convenience we here set out this order:

> "It appeared to the court that the plaintiff herein did not pay costs by March 1, 1919, according to a former order made in this cause. It is, therefore, ordered by the court that this cause be and the same is hereby dismissed." (Page 12 of record.)

On its face it is obvious that this is an order rather than a final judgment. No costs were taxed against plaintiff in this order. No execution could issue on this order.

The order was one issued by the court in the exercise of its discretion. The nature of such an order is discussed by this court in the case of *Henderson* v. *Griffin*, 5 Peters 151:

> "Rules of this kind are granted by courts to meet the justice and exigencies of cases as they occur; not depending solely on the interest which those who are subjected to such rules may have in the subject matter of suits which they bring and prosecute in the name of others but on a variety of circumstances which in the exercise of a sound discretion may furnish a proper ground for their interference."

It is clear that this is an order issued in the exercise of a proper discretion by the court in the matter of a rule of administration for the orderly procedure in the case. It was in no sense a decision on the merits. No writ of error may be properly sued out based on the issuing of a discretionary order by the trial court.

Mexican Central Railway Co., Ltd., v. *Pinkney*, 149 U. S. 194; 37 Law Ed. 699.

The order is clearly not reviewable here on the further ground that it is an order with reference to costs. It seemed proper to the court that the plaintiff should pay the costs in the former trial. This order was made, having reference solely to such payment of costs by the plaintiff. Such a matter is not the subject of review by writ of error.

Paper Bag Cases, 105 U. S. 766.

In that case judgment was given against one Nixon for one cent damages. From this judgment he appealed. The Court said:

"So far as the appeal of Thomas Nixon is concerned, the controversy is really as to costs alone. A decree against him will, consequently, not be considered."

It will be observed then that in that case the court, looking through the form to the substance, said that the whole controversy was really about costs only, and, accordingly, declined to review it. So here, this order had to do only with the payment of costs. It differs from the Paper Bag Cases only in that here the order did not even purport to be a final judgment, but on its face purported only to be an order or rule of court.

B

1. The case was properly removed. Plaintiff based his case upon injuries received while in the employment of the defendant, Republic Iron & Steel Company. He alleges a cause of action against defendant, Republic Iron & Steel Company under the Employer's Liability Act of Alabama on account of an alleged negligent order of a superior employe. He attempts to base the cause of action against Warner Stinson at common law by reason of the fact that Warner Stinson is alleged to have given him such an order.

Under the State decisions there can be no joint suit against an employer and employe where the cause of action against the employer is based upon the Employer's Liability Act and the cause of action against the employe is at common law.

Gulf States Steel Co. v. *Fail*, 78 So. 878 (Supreme Court of Alabama).

The state law will, of course, govern as to the right to

join where the State Supreme Court has held that no such joinder may be made. A joinder, as in this case, could only be made for the purpose of wrongfully defeating defendant's right of removal. The action of plaintiff in joining with defendant, Republic Iron & Steel Company, another defendant where no joint recovery could be had under the law would certainly afford the basis for an inference to be made by the District Court that the only purpose of such joinder was to defeat defendant's right of removal. Accordingly the action of the District Court in holding such joinder to be fraudulent should be upheld.

2. The petition for removal contains this allegation:

> "And this petitioner says that plaintiff at the time of the filing of his suit well knew and understood that the said Warner Stinson was not present and did not contribute positively to the infliction of any injuries on the plaintiff, and committed no positive act causing plaintiff to receive his said injuries, and that plaintiff well, and intimately and personally knew each and every person and individual who could by any possible chance have caused his injuries; and that possessing this knowledge he then well knew and yet knows that the said Warner Stinson was not and could not be in any degree whatsoever responsible to him personally for and on account of his injuries, but that he has fraudulently, improperly and illegally joined the said Warner Stinson with your petitioner as a sham defendant for the sole and only purpose of fraudulently, improperly and illegally defeating the removal of this case * * *." (Transcript Page 4.)

If these facts were true, it is clear that the joinder was fraudulent and that the court properly denied the motion to remand.

Wecker v. *National Enameling and Stamping Co.*,
204 U. S. 176; 51 Law Ed. 430.

It is further alleged in the petition that plaintiff tried his first case almost to a conclusion in the United States Court, when, being advised that he probably would not recover in that court because of the insufficiency of his cause of action, he took a non suit.

It affirmatively appears from the record that plaintiff's first suit on this same cause of action was removed to the United States District Court, the same court to which this writ of error is sued out. That he thereafter took a non-suit.

It is fundamental that every presumption will be given to the record in order to support the action of the District Court. Clearly from this record it is not only possible but probable that this case was tried the first time before the District Court; that it appeared from the evidence introduced before the District Court that Warner Stinson had nothing to do with plaintiff's injuries. If such a state of facts did exist, and we submit that under this record they must be presumed to have existed, then the District Judge judicially knows from the proceedings of the record in his court that Warner Stinson had nothing to do with the case.

It is quite consistent with the record that he knew this from plaintiff's own lips in the proceedings in open court in the trial of the first case. Knowing this, he properly overruled the motion to remand in the absence of the introduction of evidence by either side on this motion.

Respectfully submitted,
AUGUSTUS BENNERS,
Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1921.

Beter Wilson, Plaintiff in Error, vs. Republic Iron and Steel Company and Warner Stinson.	In Error to the District Court of the United States for the Northern District of Alabama.

[November 7, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action by an employe against his employer and a coemploye to recover for injuries sustained by the plaintiff by reason, as was alleged, of his conforming to an order or direction negligently given to him by the coemploye and to which he was bound to conform. The injuries were sustained in Alabama and the action was brought in a court of that State. The employer's liability was based on an Alabama statute, Ala. Code, 1907, § 3910, cl. 3, and that of the employe on the common law. The complaint was in a single count and treated the defendants as jointly liable.

In due time the employer presented to the state court a petition and bond for the removal of the cause to the District Court of the United States, and the removal was ordered and completed. The petition was properly verified and as grounds for the removal stated in substance, that the amount in controversy exceeded three thousand dollars, exclusive of interest and costs; that the plaintiff and the employer were citizens of different States, the former of Alabama and the latter of New Jersey; that the controversy between them was separable and properly could be fully determined without the presence of any other party; that the coemploye was a citizen of Alabama and was wrongfully and fraudulently joined as a defendant with the sole purpose of preventing a removal of the cause to the District Court; that it was not the purpose of the plaintiff to prosecute the action in good faith against the coemploye and the joinder of the latter was merely a sham or device to prevent an exercise of the employer's right

of removal; that the plaintiff had brought an earlier action in the District Court against the employer alone to recover for the same injuries and on the trial had taken a voluntary nonsuit because it appeared that he probably could not recover in that court on the evidence presented; that soon thereafter the present action, with the coemploye joined as a defendant, was begun in the state court; that the plaintiff personally and intimately knew every person who could by any possible chance have caused his injuries and knew the coemploye was not in any degree whatsoever responsible therefor; and that, as the plaintiff well knew all along, the coemploye was not guilty of any joint negligence with the employer, was not present when the plaintiff's injuries were received, and did no act or deed which caused or contributed to such injuries.

Shortly after the removal the plaintiff filed in the District Court a motion to remand the cause to the state court. This motion challenged the jurisdiction of the District Court on the grounds that one of the defendants, the coemploye, was a citizen of the same State as the plaintiff and that the removal was taken for the purpose of delaying the trial of the cause; but the plaintiff did not by the motion or in any wise traverse or take issue with any of the allegations of the petition for removal. The motion was heard on the record as it then stood with an admission that the citizenship of the parties and the amount in controversy were as stated in the petition for removal, neither party producing any affidavits or other evidence. As a result of the hearing the motion was denied because, as the order recites, the court was of opinion that "the grounds of said motion are not well taken." The plaintiff excepted. Then, on the motion of the employer, the court made an order requiring the plaintiff, within a fixed time, to pay the costs in the earlier action wherein he had taken a voluntary nonsuit,—in default of which the present action was to be dismissed. The plaintiff excepted to this order and also failed to comply with it. After the time for compliance had passed the court, conforming to the prior order, entered a judgment of dismissal.

To obtain a review of the ruling on the jurisdictional question presented by the motion to remand the plaintiff sought and obtained this direct writ of error; and in that connection the District Court certified that the jurisdictional question

presented to and decided by it was whether in the circumstances already stated it had jurisdiction to retain the cause and proceed to a determination thereof in regular course, or was required to remand the same to the state court.

Our power, on this direct writ, to review the ruling on the question indicated, although challenged, is altogether plain.

Section 238 of the Judicial Code provides for a review by us, on a direct appeal or writ of error, of the decision of a District Court "in any case in which the jurisdiction of the court is in issue," and then adds, "in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Whether a District Court into which a case has been removed from a state court may retain the same and proceed to its adjudication or must remand it to the court whence it came is a jurisdictional question the decision of which, where the jurisdiction is sustained,* may be reviewed under that section. *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 96; *McAllister* v. *Chesapeake & Ohio Ry. Co.*, 243 U. S. 302, 305.

Of course, the review can be had only after a final judgment. *McLish* v. *Roff*, 141 U. S. 661. But a judgment of dismissal, such as is shown here, is a final judgment. That it leaves the merits undetermined and may not be a bar to another action does not make it interlocutory. It effectually terminates the particular case, prevents the plaintiff from further prosecuting the same and relieves the defendant from putting in a defense. This gives it the requisite finality for the purposes of a review. *Wecker* v. *National Enameling and Stamping Co.*, 204 U. S. 176, 181-182; *Detroit and Mackinac Ry. Co.* v. *Michigan Railroad Commission*, 240 U. S. 564, 570; *McAllister* v. *Chesapeake & Ohio Ry. Co.*, *supra*; *Colorado Eastern Ry. Co.* v. *Union Pacific Ry. Co.*, 94 Fed. 312.

The jurisdictional question is all that is before us. The propriety of the ruling respecting the costs of the prior action is challenged in the assignments of error but cannot be considered. The plaintiff was at liberty to take the whole case to the Circuit Court of Appeals or to bring it here on the question of jurisdiction

*If the cause be remanded the order is not open to review. Jud. Code, § 28; Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556, 580-583; German National Bank v. Speckert, 181 U. S. 405.

alone. He took the latter course and by doing so waived all right to a review of the ruling on the other matter. *McLish* v. *Roff, supra; United States* v. *Jahn,* 155 U. S. 109; *Robinson* v. *Caldwell,* 165 U. S. 359; *Hennessy* v. *Richardson Drug Co.,* 189 U. S. 25, 33.

A civil case, at law or in equity, presenting a controversy between citizens of different States and involving the requisite jurisdictional amount, is one which may be removed from a state court into the District Court of the United States by the defendant, if not a resident of the State in which the case is brought, § 28 Jud. Code; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. *Wecker* v. *National Enameling and Stamping Co.,* 204 U. S. 176, 185-186. If in such a case a resident defendant is joined, the joinder, although fair upon its face, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly leading to that conclusion apart from the pleader's deductions. *Chesapeake & Ohio Ry. Co.* v. *Cockrell,* 232 U. S. 146, 152. The petition must be verified, § 29 Jud. Code, and its statements must be taken by the state court as true. *Illinois Central R. R. Co.* v. *Sheegog,* 215 U. S. 308, 316. If a removal is effected, the plaintiff may, by a motion to remand, plea or answer, take issue with the statements in the petition. If he does, the issues so arising must be heard and determined by the District Court, *Stone* v. *South Carolina,* 117 U. S. 430, 432; *Chicago, Rock Island & Pacific Ry. Co.* v. *Dowell,* 229 U. S. 102, 113; *Chesapeake & Ohio Ry. Co.* v. *Cockrell, supra,* pp. 152, 154, and at the hearing the petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceeding. *Carson* v. *Dunham,* 121 U. S. 421, 425-426. But if the plaintiff does not take issue with what is stated in the petition, he must be taken as assenting to its truth and the petitioning defendant need not produce any proof to sustain it. *Kentucky* v. *Powers* 201 U. S. 1, 33-34, 35.*

Here but for the joinder of the coemploye the case plainly was one which the employer was entitled to have removed into the

*And see Dow v. Bradstreet Co., 46 Fed. 824, 828; Durkee v. Illinois Central R. R. Co., 81 Fed. 1; Dishon v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 133 Fed. 471, 474-476; Donovan v. Wells Fargo & Co., 169 Fed. 363, 368-369; Hunter v. Illinois Central R. R. Co., 188 Fed. 645, 648; Jones v. Casey-Hedges Co., 213 Fed. 43, 46-47.

District Court on the ground of diverse citizenship; and, if the showing in the petition for removal be taken as true, it is apparent that the coemploye was joined as a defendant without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the employer's right of removal. This is the rational conclusion from the facts appropriately stated, apart from the pleader's deductions. The petition was properly verified and the plaintiff, although free to take issue with its statements, did not do so. He therefore was to be taken as assenting to their truth, relieving the employer from adducing evidence to sustain them, and merely challenging their sufficiency in point of law. We hold they were sufficient, in that they disclosed that the joinder was a sham and fraudulent and hence was not a legal obstacle to the removal or to the retention of the cause by the District Court.

The briefs disclose that the parties differ as to whether the local law gives any color for treating the employer and the coemploye as jointly liable,—the asserted liability of one resting on a statute and that of the other on the common law. But we do not find it necessary to solve this question. As the joinder was a sham and fraudulent—that is, without any reasonable basis in fact and without any purpose to prosecute the cause in good faith against the coemploye—the result must be the same whether the local law makes for or against a joint liability. See *Wecker* v. *National Enameling and Stamping Co., supra*, p. 183; *Chicago, Rock Island & Pacific Ry. Co.* v. *Schugart*, 227 U. S. 184, 194.

In his motion to remand the plaintiff asserted that the removal was obtained for purposes of delay. But this had no jurisdictional bearing, no attempt was made to prove it and it is not relied on here.

We think the District Court rightly sustained its jurisdiction under the removal.

Judgment affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.